STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 4, 2013
v	No. 308654 Kent Circuit Court
MELVIN JAMES MARSHALL, Defendant-Appellant.	LC No. 11-007667-FC

Before: BECKERING, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions on two counts of armed robbery, MCL 750.529, one count of felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony (second offense), MCL 750.227b. Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to a term of 5 years' imprisonment for his felony-firearm conviction, two concurrent terms of 35 to 70 years' imprisonment for his armed robbery convictions, and one term of 5 to 20 years' imprisonment for his felon-in-possession conviction. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On August 1, 2011, Grace Eyk-Lang and Stephen Plachta were approached in the parking lot of their apartment building by defendant and two other individuals (Eric Scott, and Deontae Woodhouse) who exited a tan Chevy Malibu. Scott held a handgun to Plachta's head and demanded money. Plachta said that he had none, and either the man with the gun, or one of his two companions, reached into Plachta's pockets, took his wallet and cellular telephone, and handed these items off to the third group member. Scott then pointed the gun at Eyk-Lang, and she handed over her purse. Defendant and the other two men left the apartment parking lot. Plachta observed the Malibu's license place. The license plate number was provided to police who found that the Malibu was registered to defendant at 1025 Lilac Court. The officers subsequently observed the tan Chevy Malibu parked in the back yard of that home with its dome light still illuminated. Shortly thereafter, officers using a public address system commanded the occupants of the house to come out. Within 10 to 15 minutes, Woodhouse and a child exited the house via the front door, and Scott was apprehended outside the rear of the house after breaking a window. Defendant, however, refused to exit the house for approximately one hour despite repeated commands to surrender.

After he eventually surrendered, defendant consented to a search of the home, and Eyk-Lang and Plachta's property was found in different places throughout the home. Plachta and Eyk-Lang each expressed complete confidence that Scott was one of the men who robbed them. They were less certain about the other two. Eyk-Lang testified, however, that she saw defendant driving the Malibu. Scott indicated that he, defendant, and Woodhouse, had mutually planned to commit the robbery and share in any proceeds. While Scott pointed the gun at Plachta during the robbery, defendant drove the men to the robbery in his Malibu, and ultimately took control of the gun after the robbery was complete.

II. *BATSON* CHALLENGE AND INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that the prosecutor impermissibly used a preemptory challenge to excuse a jury venire member in violation of *Batson v Kentucky*, 476 US 79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986). "[A] timely objection is necessary to preserve a *Batson* question for appellate review." *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Defense counsel made no such objection, and defendant's claim is therefore waived, *People v Knight*, 473 Mich 324, 346; 701 NW2d 715, 728 (2005), extinguishing any error, *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). We nevertheless review his claim as it relates to his claim of ineffective assistance of counsel. *People v Eisen*, 296 Mich App 326, 329-330; 820 NW2d 229 (2012).

Defendant argues that defense counsel was constitutionally ineffective for failing to object to the prosecutor's preemptory challenge. Because defendant did not move for a new trial or an evidentiary hearing, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000), citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Wash*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Effective assistance of counsel is presumed, and counsel's performance must be measured against an objective standard of reasonableness without the benefit of hindsight. *People v Payne*, 285 Mich App 181, 188, 190; 774 NW2d 714 (2009); *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

The Fourteenth Amendment forbids a party from removing a prospective juror solely on the basis of race. *Batson*, 476 US at 89.

> To establish a prima facie case of discrimination based on race, the opponent must show that: (1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a cognizable racial group; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. [*Knight*, 473 Mich at 336.]

If the trial court determines that a prima facie case of discrimination has been made, "the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike." *Id*. Such a reason does not have to be persuasive, or even plausible, only "facially valid

as a matter of law." *Knight*, 473 at Mich 337-338, citing *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769, 131 L Ed 2d 834 (1995), and quoting *Hernandez v New York*, 500 US 352, 360; 111 S Ct 1859; 114 L Ed 2d 395 (1991). "[I]f the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext, and whether the opponent of the challenge has proved purposeful discrimination." *Id*.

In this case, before making the peremptory challenge, the prosecutor had first challenged the juror at issue for cause. At that point, even assuming a prima facie showing, a race-neutral explanation for the juror's dismissal was articulated. In addition to another offense, the prosecutor had records showing that the juror had been arrested by the Grand Rapids police for theft, but the juror indicated that he could not remember whether he had been arrested. Because a race-neutral explanation was articulated, the analysis turns on whether the prosecutor's argument was mere pretext. Such an analysis presents a question of credibility. See *People v Bell*, 473 Mich 275, 283; 702 NW2d 128 (2005), mod 474 Mich 1201 (2005) (citation omitted). Defendant appears to argue that discriminatory intent is shown because there were four venire members who had "run-ins" with the law, but only the one juror who was African-American was challenged, and this happened after the prosecutor had brought up the issue of race. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El v Dretke*, 545 US 231, 241; 125 S Ct 2317; 162 L Ed 2d 196 (2005). The race of the other venire members is not apparent in the record, but even if it were, defendant has failed to show that the juror at issue was similarly situated to the other three members with criminal histories. Unlike the others, the juror's history appeared to include more than one criminal violation, one of which (unlike those of the other jurors) was similar in kind to that charged in the instant case, and the juror claimed not to remember this additional incident. Defendant has not established that a *Batson* violation occurred, and as a result he has not shown that counsel's failure to raise the issue fell below an objective standard of reasonableness. *Strickland*, 466 US at 688, 694.

III. OV 12 AND OV 13

Next, defendant argues that 25 points were improperly scored for offense variable (OV) 13 because he had no "scorable" felony convictions within five years of the offense. OV 13 is scored for a "continuing pattern of criminal behavior," and 25 points should be scored when "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). In scoring OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). A trial court is required to score OV 13 at the highest appropriate level. See MCL 777.43(1). Resisting or obstructing a police officer, MCL 750.81d, is categorized as a crime against a person, MCL 777.16d, as is armed robbery. MCL 777.16y; *People v Hendricks*, 446 Mich 435, 451; 521 NW2d 546 (1994). Therefore, defendant's two convictions for armed robbery in this case qualify. MCL 777.43(2)(a). The third (and uncharged) offense that the trial court found, for purposes of scoring OV 13, was resisting or obstructing a police officer in the performance of his duties, MCL 750.81d(1). We conclude that OV 13 was properly scored, although the trial court erred in failing to score OV 12 at 10 points.

The testimony showed that the police used a public address system to command everyone inside 1025 Lilac to come out of the house, and the other three people in the house exited in short order, with only defendant remaining inside. A defendant knows or has reason to know a police officer is acting in the performance of his duties when the officer is in full uniform with a marked patrol vehicle. *People v Nichols*, 262 Mich App 408, 413; 686 NW2d 502 (2004). Thus, the trial court could conclude that defendant knew or had reason to know he was failing to comply with the loudly declared order of a police officer performing his duties. Since "obstruct" includes the "knowing failure to comply with a lawful command," MCL 750.81d(7)(a), and in light of the exigent circumstances exception, *Snider*, 239 Mich App at 410, the preponderance of the evidence supports that defendant resisted or obstructed a police officer in violation of MCL 750.81d(1).

Defendant claims that obstructing the police officers should have been scored in OV 12 instead of OV 13. "[C]onduct subject to scoring under [OV] 12, MCL 777.42, must be considered under that variable before it is considered under OV 13 . . . ." *People v Williams*, 486 Mich 1077; 784 NW2d 206 (2010), citing *People v Bemer*, 286 Mich App 26; 777 NW2d 464 (2009). However, MCL 777.43(2)(c) provides that, "[e]*xcept for offenses related to membership in an organized criminal group* . . . do not score conduct scored in offense variable 11 or 12," in OV 13. (Emphasis added). Thus, a trial court is prohibited "from considering conduct that was scored under MCL 777.41 and MCL 777.42 unless the conduct scored under those statutes was related to 'membership in an organized criminal group . . . .'" *Id*. at 33. Although what comprises an "organized criminal group" is not specifically defined, MCL 777.43(2)(b) provides that "[t]he presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense." Here, the evidence clearly showed the existence of a criminal group involving defendant, Scott, and Woodhouse that had jointly preplanned the robbery. The armed robberies were clearly related to defendant's membership in an organized criminal group.

The question of whether the uncharged resisting or obstructing offense was "related" to membership in an organized criminal group is a closer call. However, we conclude on the record before this Court that the trial court did not err in finding this offense to be so related.

> Black's Law Dictionary (6th ed), p 1288, defines "related" as "[s]tanding in relation; connected, allied; akin." . . . The *Random House Webster's College Dictionary* (1995), p 1136, defines "related" as "associated; connected" and "relation" as "a significant association between or among things; connection; relationship: *the relation between cause and effect*." [*People v Smielewski*, 214 Mich App 55, 62; 542 NW2d 293 (1995) (emphasis in original).]

Here, defendant obstructed police officers who encountered him while searching for a group of armed robbers. Defendant was in the house with another of the members of the criminal group, as well as the stolen property. Defendant would not have had occasion to resist or obstruct police had he not been a member of an organized criminal group. Because we will uphold a scoring decision when the record contains any evidence in support of the decision, *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012), we find that the trial court did not err in scoring 25 points for OV 13.

However, OV 12 should have been scored at ten points in addition to the scoring of 25 points in OV 13. OV 12 is properly scored when a defendant has committed "contemporaneous felonious criminal acts," with 10 points awarded when "[t]wo contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(1)(b). The trial court's decision to score OV 13 should not have prevented the scoring of OV 12. Nonetheless, even if OV 12 was scored, defendant's sentencing range would not have been affected. Therefore resentencing is not required. See *People v Sims*, 489 Mich 970, 970; 798 NW2d 796 (2011), mod on other grounds 490 Mich 857 (2011), citing *People v Francisco*, 474 Mich 82, 90 n 8; 71 NW2d 44 (2006) ("Where a scoring error does not alter the guidelines range, resentencing is not required.").

IV. OV 14

Finally, defendant argues that OV 14 was improperly scored because there was no evidence defendant's role was that of a leader. "A trial court appropriately assesses 10 points for OV 14 when the defendant was a leader in a multiple-offender situation. The entire criminal episode must be evaluated to determine whether a defendant was a leader." *Lockett*, 295 Mich App at 184, citing *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004); MCL 777.44. In this case, the group used defendant's car to commit the robberies, and the testimony established that defendant was the driver. There was also testimony that defendant took control of the gun after the armed robberies. Finally, the group retired to defendant's home after the robbery, and the stolen items were found scattered throughout the house. There was adequate evidence in support of the trial court's finding that defendant acted as a leader for purposes of scoring OV 14. See *Lockett*, 295 Mich App at 182; *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Affirmed.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra